85-813

No.

Supreme Court, U.S.
FILED
NOV 12 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MINNESOTA TIMBER PRODUCERS ASSOCIATION, INC.,
Petitioner,

vs.

AMERICAN MUTUAL INSURANCE COMPANY OF BOSTON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
For the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

DANIEL H. MUNDT
MUNDT & ASSOCIATES
715 West Superior Street
Duluth, Minnesota 55802
(218) 722-3665
Attorney for Petitioner

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

48

QUESTIONS PRESENTED

1. Whether the court of appeals violated petitioner's Seventh Amendment right to jury trial by determining as a matter of law that no fiduciary obligation existed between the parties.

2. Whether the court of appeals' holding that the trial court did not submit the fraud issue to the jury contradicts Rule 49(a) of the Federal Rules of Civil Procedure and prior decisions of this Court.

TABLE OF CONTENTS

	Page
Opinion Below	2
Jurisdiction	2
Constitutional Provision and Federal Rule	2
Statement	3
Reasons for Granting Petition	9
Conclusion	21
Appendix:	
A - Court of Appeals opinion	A-1
B - Court of Appeals Judgment	A-15
C - Order denying Rehearing and Rehearing En Banc	A-16
D - Trial Exhibit (summary of MTPA-AM Plan)	A-17

TABLE OF AUTHORITIES

Cases:

A & G Stevedores v. Ellerman Lines, 369 U.S. 355 (1962)	20, 21
Anderson v. City of Bessemer, ____ U.S. ____, 105 S.Ct. 1504 (1985)	21
Avalon East, Inc. v. Monaghan, 251 N.Y.S.2d 290 (N.Y. Sup. Ct. 1964)	11
Barr/Nelson, Inc. v. Tonto's Inc., 336 N.W.2d 46 (1983)	15

Ben Gay, Inc. v. Giesbrecht, 720 F.2d 1003 (8th Cir. 1983) 9

Benson Cooperative Creamery Assn. v. First District Assn., 276 Minn. 520, 151 N.W.2d 422 (1967) 14

Clements Auto Company v. Service Bureau Corp., 444 F.2d 169 (8th Cir. 1971) 12

Columbia Plaza Corp. v. Security National Bank, 676 F.2d 780 (D.C. Cir. 1982)..... 19

Dawson v. Chrysler Corp., 630 F.2d 950 (3rd Cir. 1980), *cert. denied,* 450 U.S. 959 (1981)..... 10

Dick v. New York Life Insurance Company, 359 U.S. 437 (1959)..... 21

Dobbs v. Gulf Oil Company, 759 F.2d 1213 (5th Cir. 1985)..... 19

Gallick v. Baltimore & Ohio Railway Company, 372 U.S. 108 (1963) 20

Jacobs v. Farmland Insurance Company, 352 N.W.2d 803 (Minn. Ct. App. 1984)..... 15, 20

Julien J. Studley, Inc. v. Gulf Oil Corp., 407 F.2d 521 (2nd Cir. 1969)..... 20

Lavender v. Kurn, 327 U.S. 645 (1946) 12, 21

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387 (1923)..... 9

McIntyre v. Everest & Jennings, Inc., 575 F.2d 155, (8th Cir. 1978), *cert. denied,* 439 U.S. 864 (1978) .. 9

Molex, Inc. v. Nolen, 759 F.2d 474 (5th Cir. 1985) 17

Muldrew v. Anheuser-Busch, Inc., 728 F.2d 989 (8th Cir. 1984) 20

Murphy v. Country House, Inc., 240 N.W.2d 507 (1976) 11

Neely v. Martin K. Eby Construction Company, 386 U.S. 317, *reh'g denied*, 386 U.S. 1027 (1967) 21

Rochester Civic Theatre v. Ramsay, 368 F.2d 748 (8th Cir. 1966) 21

Sentilles v. Inter-Caribbean Shipping Corp., 361 U.S. 107 (1959) 9

Slocum v. New York Life Insurance Company, 228 U.S. 364 (1913) 9

Tennant v. Peoria & P.U. Railway Company, 321 U.S. 29 (1944) 10

W.K.T. Distributing Company v. Sharp Electronics, 746 F.2d 1333 (8th Cir. 1984) 14

Constitution, Statutes, and Federal Rules of Civil Procedure:

United States Constitution, Seventh Amendment 2, 9

28 U.S.C. § 1254(1), Jurisdiction of United States Supreme Court 2

28 U.S.C. § 1331, Diversity of Citizenship 7

FED. R. CIV. P. Rule 49(a) 2, 15

Miscellaneous:

J. Brown, *Federal Special Verdicts: The Doubt Eliminator*, 44 F.R.D. 245 (1968) 19

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MINNESOTA TIMBER PRODUCERS ASSOCIATION, INC.,*

Petitioner,

vs.

AMERICAN MUTUAL INSURANCE COMPANY OF BOSTON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals
For the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

Minnesota Timber Producers Association, Inc., through its attorney, petitions this Honorable Court for a writ of certiorari to review portions of the decision of the United States Court of Appeals for the Eighth Circuit in this case.

---

* Named parties in the action below in addition to petitioner and respondent, include Tom Evenson, James Hall, Thomas McCabe, Clayton Peterson, John Sullivan, and all others similarly situated, as Apellees/Intervenors.

OPINION BELOW

The opinion of the court of appeals is reported at 766 F.2d 1261. The opinion is reproduced as petitioner's Appendix A at page A-1.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 1985, and a petition for rehearing was denied on August 20, 1985. See petitioner's Appendices B and C at pages A-15 and A-16 respectively. This petition is submitted pursuant to Rule 19 of the United States Supreme Court. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

1. The Seventh Amendment to the United States Constitution provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

2. Rule 49(a) of the Federal Rules of Civil Procedure provides:

> (a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate.

The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

STATEMENT

The petitioner and plaintiff in this action is the Minnesota Timber Producers Association (Association), a Minnesota nonprofit corporation. The defendant in this action is American Mutual Insurance Company of Boston (American Mutual), a large insurance carrier with its home offices located in Wakefield, Massachusetts.

In 1969 American Mutual communicated to the Association that it was interested in writing a workers compensation group insurance program for Association members. American Mutual presented written "formal" proposals for a Workers Compensation Safety Group Dividend Plan (the Plan or MPTA-AM Plan) to Association representatives in July of 1972.

The parties negotiated on the formal proposal for a number of months. There were several points in contention. One of the most significant was that the Association opposed including a contingency balance fund in the Plan. It was finally agreed that the MTPA-AM Plan would include a contingency balance fund. The parties agreed that the monies in the contingent fund belonged to the Association but were held in escrow by American Mutual. A copy of the "plan" as agreed upon by the parties is reproduced as petitioner's Appendix D at p. A-17-18.

In December 1972 the Association Board of Trustees by formal action accepted and agreed to the MTPA-AM Plan. Minimum contribution requirements necessary to commence the Plan were met in July of 1973 and the plan became effective and operational retroactively to May 1, 1973.

The basic concept of the MTPA-AM Workers Compensation Safety Group Dividend Plan was to pool experiences, losses, and premiums of individual participating members under the master agreement between American Mutual and the Association. The policyholders would not be rated individually but would be issued individual policies.

The MTPA-AM Plan provided that each participant would pay a premium for workers compensation insurance coverage at the rate set by Minnesota law. This premium was pooled with the premiums paid by other MTPA-AM Plan participants. Pursuant to the plan American Mutual deducted from the pooled premium various charges including basic administration charges, total group losses, adjustments to reserves, and an insurance charge. Under the MTPA-AM Plan, the balance of the premium ("Gross Dividend") after these deductions was to be redistributed to the individual policyholders as cash dividends.

Five provisions critical to this litigation were contained in the MTPA-AM agreement. They were as follows:

1) To avoid large fluctuations in annual dividends, part of the "Gross Dividend" was set aside to fund a contingent balance escrow fund.

2) The contingent balance fund was to be held in escrow by American Mutual.

3) The only purpose of the contingent balance escrow fund, according to the agreement between the parties, was to stabilize the annual dividend distribution to Plan participants.

4) The MTPA-AM Plan specifically provided that this escrowed money belonged to the Association and not to the insurance company.

5) The contingent balance escrow fund was subject to a cap-level limitation. Thus, the maximum contingent balance figure on two million dollars in premiums would be approximately $230,000.

Under the MTPA-AM Plan, the annual dividends were to be paid approximately eight months after the close of the policy year. The most appealing aspect of the Plan was that each participant was to receive the same percentage dividend, based on his individual total premium, as the other participants regardless of his individual loss experience.

The agreement between the parties was systematically followed from 1973 to 1978. Plan losses and the contingent fund status were regularly reported by American Mutual representatives to the Association. Various problems pertaining to the Plan were regularly reviewed and acted upon by the Association through its Insurance Committee and Board of Directors.

In 1978 unknown to anyone, except American Mutual representatives, American Mutual created a new separate fund. American Mutual then proceeded to retain in this fund substantial sums of money that properly should have been paid to the participants in the form of dividends under the MTPA-AM Plan formula. American Mutual characterized this additional account as a "dividend stabilization fund", even though American Mutual knew that the amounts being placed in the fund were far in excess of what was permitted by the MTPA-AM agreement.

During the period from 1978 to 1980 the Association and the Plan participants grew increasingly concerned with rising insurance costs, interest rates, and the inadequate servicing of accounts by American Mutual. Decreases in the number of logging contracts and increased workers compensation costs caused the Association to have doubts about its continued participation with American Mutual in the MTPA-AM Plan. The Association, however, had no knowledge that American Mutual had established the dividend stabilization fund, and thereby diverted

hundreds of thousands of dollars from the agreed Plan. The Association officers simply did not understand why the Plan was not working properly.

At various times during this period, Mr. Joe Penn, American Mutual's account representative for Minnesota, consistently misrepresented the amount of withheld funds to Association officials. Specifically, in November 1978 Mr. Penn represented to the Association that the amount of withheld funds equaled $188,000 when in fact, American Mutual held over $415,000. In April 1980 Mr. Penn informed the Association that $217,184 was being held by American Mutual. In truth, American Mutual held $599,712. In July 1980 Mr. Penn represented that the withheld balance was $225,000. In reality the balance was $411,126.

Mr. Penn was reporting what he knew to be deceptive and incorrect figures as the amounts withheld by American Mutual. The amounts represented did, however, basically comport with the cap-level on two million dollars in premiums. For this reason the Association did not suspect that American Mutual had altered the procedure for determining the escrow amounts.[1]

In March 1981, after efforts to reform the parties' agreement proved fruitless, the Association notified American Mutual in writing that the Association's Board of Directors had voted to terminate the Minnesota Timber Producers Workers Compensation Safety Group Dividend program with American Mutual. The MTPA-AM Plan policies continued in effect until the end of the policy year on April 30, 1981. Thereafter, most of the MTPA-AM Plan policyholders discontinued their coverage with American Mutual.

---

[1] Association representatives did not become aware until after termination of the contract and commencement of this litigation in federal district court that American Mutual had in fact retained amounts substantially in excess of the amounts represented by Mr. Penn.

Subsequent to its termination of the contract, the Association requested that American Mutual return the escrowed funds in the contingent balance fund, which under the terms of the contract between the parties belonged to the Association. American Mutual refused to return the escrowed funds and took the position that the Association's termination of "its endorsement" did not have the effect of terminating the MTPA-AM group and therefore, the Association had no right to the fund balance.

The Association initiated legal action in Federal District Court for the District of Minnesota seeking the return of the money in the contingent balance escrow fund, damages for lost interest, and punitive damages for American Mutual's fraudulent misrepresentations. Federal jurisdiction was based on diversity of citizenship pursuant to 28 U.S.C. §1332.

A four day jury trial was held in April of 1984 in Duluth, Minnesota, the Honorable Miles W. Lord presiding. The jury returned a special verdict awarding the Association $237,836 in compensatory damages and $1,000,000 in punitive damages.

American Mutual appealed the district court judgment on the basis that the Association was not a real party in interest, that the evidence did not support the jury finding that a contract existed between the Association and American Mutual, and that no proof existed of an independent tort upon which an award of punitive damages could be based under Minnesota law. American Mutual also appealed the district court's order allowing the intervention of numerous individual policy holders following the entry of judgment by the trial court and the certification of the suit as a class action by the trial court.[2] Oral argument was heard in early December of 1984 and the court of appeals issued its decision in July of 1985.

---

[2] The court of appeals did not address the class action portion of this litigation and petitioner does not raise it here.

The Court of Appeals for the Eighth Circuit held that the evidence supported a jury finding that a contract existed between the Association and American Mutual; that the evidence supported the jury finding that American Mutual breached its contract with the Association; that the amount of compensatory damages awarded by the jury to the Association was incorrect; that the cause of action based on fraud was not submitted to the jury; and that as a matter of law American Mutual owed no fiduciary duty to the Association. Further, the court of appeals held that because no separate cause of action based on fraud was submitted to the jury and because no fiduciary relationship existed as a matter of law, the jury improperly awarded exemplary damages to the Association.

REASONS FOR GRANTING THE PETITION

The petitioner is keenly aware that this Court is loathe to grant certiorari to review evidence and specific facts. See *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U.S. 107, 111 (1959) (Frankfurter, J., dissenting). This case, however, raises important questions concerning a party's Seventh Amendment right to jury trial and the proper application of Rule 49(a) of the Federal Rules of Civil Procedure. Therefore, the review and settlement of the questions presented to this Court constitute matters of substantial importance to the general litigating public and not simply the parties to this action. See *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

1. The Court Of Appeals Has Overstepped Its Review Powers In Contravention Of Plaintiff's Seventh Amendment Right To Trial By Jury.

The Seventh Amendment to the United States Constitution provides that no fact determined by a jury shall be reexamined except in accordance with the rules of common law. U.S. CONST. AMEND. VII. This Court has always jealously guarded this constitutional right. *Slocum v. New York Life Insurance Company*, 228 U.S. 364 (1913).

The opinion of the court of appeals in this case is totally devoid of any statement of the applicable standard of review for vacating the jury's determination that American Mutual breached its fiduciary obligation to the Association. The standard in the Eighth Circuit appears to be that:

> An appellate court may not substitute its view of the facts for that of the trier of fact unless it is in a position to hold that reasonable minds, viewing the evidence in the light most favorable to the prevailing party, could only have found otherwise than the trier of fact.

Ben Gay, Inc. v. Giesbrecht, 720 F.2d 1003, 1005 (8th Cir. 1983); *McIntyre v. Everest & Jennings, Inc.*, 575 F.2d 155, 158

(8th Cir. 1978), *cert. denied,* 439 U.S. 864 (1978). The court of appeals did not follow its own rule in this case.

The findings of the court of appeals that American Mutual owed the Association no fiduciary duty and that American Mutual was entitled to use the monies in the contingent balance fund to cover unexpected losses have no support in the trial record and are totally against the weight of the evidence. American Mutual produced only one witness at trial. That witness, an underwriting vice president, was never involved in negotiating the agreement between the parties nor in the operation of the Plan during its first seven years of existence. Yet the court of appeals, without explaining the basis of its decision, determined as a matter of law that no fiduciary relationship existed between the Association and American Mutual, in spite of the escrow agreement, and that American Mutual had the right to use the escrowed funds to pay its losses.

This Court has clearly stated that it is not the function of an appellate court to search the record for conflicting evidence in order to take the case away from the jury on the theory that the proof also supports inconsistent inferences from those drawn by the jury. *Tennant v. Peoria & P.U. Railway Company,* 321 U.S. 29, 35 (1944). To the point, "[c]ourts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." *Id.* at 35.

In this case, the court of appeals has conducted what can only be characterized as an improper de novo weighing of the evidence in the record. Such a procedure is contrary to the commands of the Seventh Amendment right to jury trial. *Dawson v. Chrysler Corp.,* 630 F.2d 950, 959 (3rd Cir. 1980).

a. **By holding that defendant American Mutual owed no fiduciary duty to the Association the Court of Appeals for the Eighth Circuit has acted as a trier of fact and substituted its judgment for that of the jury.**

Because jurisdiction in this case is based on diversity of citizenship, Minnesota substantive law applies to the merits. Under Minnesota law the existence of a fiduciary relationship is a question of fact. *Murphy v. Country House, Inc.*, 240 N.W.2d 507, 512 (Minn. 1976). The court of appeals, contrary to the jury finding, held as a matter of law that no fiduciary relationship existed between the Association and American Mutual. Appendix at p. A-12. The court of appeals, however, overlooked two incredibly important facts.

First, the agreement between the parties required that the Association, through its Insurance Committee, represent the Plan participants. Uncontroverted and undisputed testimony at trial established that American Mutual treated the Association as the participants' agent and the Association accepted and acted on that responsibility for many years. Therefore, American Mutual's duty to act in good faith and in an honest, forthright manner towards the individual participants also extended to the Association.

Second, the court of appeals ignored the controlling fact that the parties' agreement provided for an escrow arrangement. Pursuant to the contract between the parties, American Mutual placed "escrowed" monies in the contingent balance fund. These funds belonged "to [the] Association." There is no question as to the fiduciary nature of an escrow relationship. *Avalon East, Inc. v. Monaghan*, 251 N.Y.S. 2d 290, 296 (N.Y. Sup. Ct. 1964).

The court of appeals found that the parties were dealing at arms length and that the only evidence to support the Association's assertion of a fiduciary relationship was testimony that the Association "trusted" American Mutual. Appendix at

p. A-12. If the court of appeals had carefully reviewed the record it would have found that much more than simple "trust" of American Mutual by the Association was involved in the handling of these escrowed funds.

American Mutual is an insurance expert. The Association and the plan participants are laymen in regard to insurance. Testimony at trial pertaining to the operation of the Plan made clear that the Association looked to and relied on the expertise of American Mutual in insurance matters while the Association contributed its expertise in logging and timber production matters. For the court of appeals to find that the parties were equals dealing at arms length is simply incongruous. See Appendix at p. A-12. Compare *Clements Auto Co. v. Service Bureau Corp.*, 444 F.2d 169, 183 (8th Cir. 1971) (the court takes notice of inequalities between computer company and automobile dealer).

At trial the court carefully instructed the jury on the issue of fiduciary relationships. The special verdict form contained a question specifically addressed to the issue of fiduciary obligation. The jury heard testimony on and recognized the escrow arrangement. The jury also recognized that as an insurance company American Mutual had a superior knowledge and substantial influence over the Association and the Plan participants pertaining to all financial aspects of the Plan. The jury's finding that American Mutual committed a breach of trust and violated its fiduciary relationship is in accordance with this recognition.

The court of appeals, however, without any explanation or support in the record, has incorrectly substituted its judgment for that of the jury by holding that American Mutual owed no fiduciary obligation to the Association. See *Lavender v. Kurn*, 327 U.S. 645, 652-53 (1946) (no reversible error occurs unless there is a complete lack of probative facts to support the jury's conclusion; any inferences contrary to the jury's view that might be drawn from the evidence become totally irrelevant and immaterial on appeal).

b. **Amounts in the contingent balance fund were not available to pay the insurance company's losses.**

The court of appeals' determination that the contingent balance fund sums were available to pay losses is simply wrong. The court of appeals is correct, however, in its holding that the money contained in the contingent balance escrow fund of the Safety Group Dividend Insurance Plan belongs to the participants of the Plan. Appendix at p. A-10.

The court of appeals held that upon termination of the insurance group the participants would be entitled to a full accounting and return of the funds held by American Mutual. *Id.* at p. 10. Yet the court incorrectly states that the money placed in the escrowed contingent balance fund under the agreement between American Mutual and the Association was to be retained by the insurance company "both *to cover unexpected losses* and to help stabilize dividend return." *Id.* at p. A-4 (emphasis supplied). On this basis the court of appeals reversed the jury award to the Association of sums contained in the contingent balance fund at the time this action was commenced. The amount of this award was $145,292. *No* evidence in the trial record supports the court of appeals' determination.

The Plan, as agreed to by American Mutual and the Association, contained a provision that specifically provides that the contingent balance was held in escrow. The testimony at the trial made clear that the contingent fund was reluctantly agreed to by the Association only on the basis that the contingent fund be escrowed and that it belonged to the Association.

The amount annually added to the contingent balance fund was based on a specific formula contained in the Plan. No provision was included in the agreement at any time allowing American Mutual to use the amounts contained in the contingent balance fund for unexpected losses. In fact, the agreement provided the money could only be used to stabilize dividends. There is no basis in the trial record for the court of

appeals' conclusion that the parties agreed that this fund was available to American Mutual to cover unexpected losses.[3]

c. **The court of appeals' determination that the issue of contract termination was not litigated ignores the findings of the jury.**

The court of appeals erroneously suggests that the Association had no right to terminate the group plan because the contract was silent as to termination. Appendix at p. A-10. This holding is in direct conflict with both the court of appeals' own decisions and those of the Minnesota Supreme Court. In Minnesota if the contract is silent on termination, as the parties' agreement is, then *both* parties have a concurrent right of termination. *W. K. T. Distributing Company v. Sharp Electronics,* 746 F.2d 1333, 1335 (8th Cir. 1984); *Benson Cooperative Creamery Assn. v. First District Assn.,* 276 Minn. 520, 151 N.W.2d 422, 426 (1967). The parties agreed and the trial court ruled that this is the applicable law. There is no rational reason or authority why one party to the contract found here by both the jury and the court of appeals should have the absolute right of termination and the other only the right to withdraw.[4]

---

[3] By finding that the contingent balance fund was available to cover losses the court of appeals effectively guaranteed that the participants of the group plan will never receive one penny of the monies contained in the contingent balance fund. Following the Association's termination of the Plan, American Mutual consistently took the position that these monies were used to cover losses and that no money remained in the contingent balance fund.

[4] Petitioner is frankly confused by the court of appeals' ruling that the Association may recover $92,544 for breach of contract yet it has no right to terminate the group's contractual relationship with American Mutual. In effect the court has held that the Association is entitled to interest on money it does not own.

In sum, the court of appeals' failure to properly apply any stated standard of review to the jury's factual determination that American Mutual breached its fiduciary obligation to the Association and thereby reversing the jury finding, violates petitioner's Seventh Amendment right to jury trial.

2. The Holding Of The Court Of Appeals That The Issue Of Fraud Was Not Submitted To The Jury Contravenes Rule 49(a) Of The Federal Rules Of Civil Procedure.

Rule 49(a) of the Federal Rules of Civil Procedure provides that the trial court will give the jury explanations and instructions concerning matters submitted to jury as may be necessary for the jury to make a finding of fact on each issue. If the court omits any issue of fact a party waives his right to trial by jury of that factual issue unless the party demands its submission to the jury. As to such an omitted issue the trial court may make a finding and if it fails to do so, a finding in accordance with the judgment on the special verdict shall be deemed made by the court. FED. R. CIV. P. 49(a) (West 1968).

The court of appeals states in its opinion, "[B]ecause the only cause of action submitted to the jury was based on breach of contract, we are concerned only whether the *same actions* constituting the breach also constitute the independent tort of fraud." Appendix at p. A-12 (emphasis supplied). Unfortunately the court does not explain why it does not believe the fraud issue was submitted to the jury. Regardless of this lack of explanation no supportable basis exists for the court of appeal's determination that the issue of fraud was not submitted to the jury.

It is settled law in Minnesota that an award of punitive damages must be based on a separate cause of action and cannot be awarded for breach of contract. *Barr/Nelson, Inc. v. Tonto's Inc.*, 336 N.W.2d 46, 51-52 (1983); *Jacobs v. Farmland Insurance Company*, 352 N.W.2d 803, 807 (Minn. Ct. App.

1984). The court of appeals mystically alludes to "certain actions of the company [that] might have given rise to separate tort liability and potentially to punitive damages . . . ." Appendix at p. A-13. The jury was well aware of the extent of the company's actions and properly registered its response to those actions in the special verdict.

The misrepresentations of American Mutual's representative, Joe Penn, constitute the activities or "actions" upon which the fraud count in this case is based. Mr. Penn knowingly misrepresented and concealed the amount of money wrongfully withheld from dividends by American Mutual.

The jury had before it uncontradicted testimony and evidence that Mr. Penn, over a number of years, repeatedly lied to the Association about the amount of the withheld funds. As an agent for the Association, such conduct clearly constitutes a fraudulent breach of American Mutual's fiduciary duty. Because of Mr. Penn's representations, American Mutual wrongfully gained the use of the excess funds at a time when interest rates were at an all time high.

The court of appeals awarded to the Association the interest that was earned on the wrongfully withheld funds. Basic common sense dictates that the fraud, which was the basis for part of the jury's award, cannot be ignored.

American Mutual's mere establishment of the dividend stabilization fund in contravention of the parties' agreement is clearly different from Mr. Penn's misrepresentations pertaining to the total amounts withheld and his willful coverup of the existence of this second dividend stabilization fund. The court of appeals erroneously overlooked this distinction; the trial court and the jury did not.

Contrary to the conclusion of the court of appeals, separate causes of action were submitted to the jury for its determination. The jury was instructed, at American Mutual's request, on the issue of fraud. At the time of the fraud instruction,

American Mutual asked for and received several additions to the fraud instruction. Clearly, American Mutual's requests must be viewed as a demand for the submission of the fraud issue to the jury under Rule 49(a). Compare *Molex, Inc. v. Nolen*, 759 F.2d 474, 478 (5th Cir. 1985) (under Rule 49(a), failure to request submission of an issue or to object to the absence of an issue in the special verdict form given to the jury bars assignment of error on that factual issue).

The trial court specifically submitted the issue of fraud to the jury when it stated, "I asked you question 5, 'Was there *fraud* or breach of trust?' "

Nothing more clearly demonstrates that the issue of fraud was submitted to the jury than the special verdict form itself, set forth in the margin in its entirety.[5]

---

[5] **SPECIAL VERDICT FORM**

QUESTION 1. Was there an agreement between the Minnesota Timber Producers Association and American Mutual Insurance Company which controlled the individual policies issued?

ANSWER: Yes
(Yes or No)

QUESTION 2. If you answered Yes to Question 1, was the contract breached by defendant American Mutual Insurance Company?

ANSWER: Yes
(Yes or No)

QUESTION 3. If you answered Yes to Question 2, was the plaintiff Minnesota Timber Producers Association damaged as a result of the breach?

ANSWER: Yes
(Yes or No)

QUESTION 4. If you answered Yes to Questions 1, 2 and 3, what amount of money would properly compensate the plaintiff Minnesota Timber Producers Association

The breach of contract cause of action is contained in questions 1 through 4 of the special verdict form. Questions 2, 3, and 4 are predicated on the jury's answering question 1 in the affirmative.

Question 5 presented the jury with the question of whether the activities of American Mutual constituted fraud or breach of trust. It was not necessary for the jury to answer any other question on the special verdict form in order to determine whether the Association had proven its tort count. Question 5 represents a cause of action separate from the breach of con-

---

for its actual damages directly arising from said breach?

ANSWER: $237,836.00 (number)
Two hundred thirty seven thousand eight hundred thirty six dollars (amount in words)

QUESTION 5. Did the activities of defendant American Mutual insurance Company constitute fraud or a breach of trust?

ANSWER: Yes
(Yes or No)

QUESTION 6. If you answered Yes to Question 5, was the conduct of the defendant American Mutual Insurance Company so willful or malicious so as to warrant punitive damages?

ANSWER: Yes
(Yes or No)

QUESTION 7. If you answered Yes to Question 6, what amount of damages should properly be awarded as punitive damages?

ANSWER: $1,000,000.00 (number)
One million dollars (amount in words)

Dated 4-13-84

Signed Thomas J. Hankins
Foreperson of the Jury

tract action and the jury found in favor of Association on the tort cause of action.

Question 6 of the special verdict relates to the cause of action based on tort and has no application to questions 1 through 4 relating to breach of contract. Question number 7 is predicated on the answering of both question 5 and question 6 in the affirmative and it also has absolutely no application to questions 1 through 4 of the special verdict form.

American Mutual did not object to the special verdict form. In fact, American Mutual actively participated in drafting this special verdict form. The issue of fraud was argued by counsel to the jury.

The special verdict form was simple, clear, and concise and left no room for confusion on the part of the jury. *Dobbs v. Gulf Oil Co.*, 759 F.2d 1213, 1215-16 (5th Cir. 1985). The form of the special verdict is for the trial judge to determine and may only be reviewed for abuse of discretion. *Columbia Plaza Corp. v. Security National Bank*, 676 F.2d 780, 789 (D.C. Cir. 1982).

Evidence supports each of the jury's findings in the special verdict. As an American Mutual Accounts Representative, Mr. Penn clearly had nothing to do with the establishment of the second "dividend stabilization fund" by American Mutual's board of directors. Moreover, he did not participate in establishing the original agreement. All evidence and testimony relating to the misrepresentations of Joe Penn were introduced at trial for the specific and obvious purpose of establishing tortious conduct based on fraud or breach of fiduciary obligation.

Rule 49(a) of the Federal Rules of Civil Procedure is intended to fill any gaps left by inconsistent or incomplete findings of fact by the jury's answers to the special verdict. See J. Brown, *Federal Special Verdicts: The Doubt Eliminator*, 44 F.R.D. 245, 349 (1968). The Rule mandates that the court of appeals review the record and determine that *no* possible view of the case exists

which will support the jury finding before it may dismiss that finding. The court of appeals has failed in its duty.

Rule 49(a) is analagous to Rule 49(b) pertaining to general verdicts with accompanying interrogatories. This Court and numerous lower courts have recognized, for example, that Rule 49(b) of the Federal Rules of Civil Procedure requires a reviewing court to attempt to harmonize inconsistent answers to interrogatories accompanying general verdicts. See, e.g., *Gallick v. Baltimore & Ohio Railway Company,* 372 U.S. 108 (1963); *A & G Stevedores v. Ellerman Lines,* 369 U.S. 355 (1962); *Julien J. Studley, Inc. v. Gulf Oil Corp.,* 407 F.2d 521 (2nd Cir. 1969).

In *A & G Stevedores,* this Court stated that "to search for a possible view of the case which will make the jury's findings inconsistent results in a collision with the Seventh Amendment." *A & G Stevedores,* 369 U.S. at 364. To avoid a finding of inconsistency the reviewing court must attempt reconciliation "by exegesis if necessary." *Gallick,* 372 U.S. at 119. No less a standard should apply when reviewing jury findings under Rule 49(a).

In *Muldrew v. Anheuser-Busch, Inc.,* 726 F.2d 989 (8th Cir. 1984), the court of appeals stated that an appellate court cannot reject a jury's finding of fact unless the court is left with a firm and definite conviction that a mistake has been committed. *Id.* at 992-93. In this action, the jury made no mistake. There is substantial evidence in the record to support all of the jury's findings that American Mutual's activities constituted fraud. More importantly there is *not* one piece of evidence or testimony refuting the fraud. Furthermore, the court of appeals' determination that the issue of fraud was not submitted to the jury is in direct contravention of Rule 49(a) of the Federal Rules of Civil Procedure. See *Jacobs v. Farmland Mutual Insurance Co.,* 352 N.W.2d 803, 807 (Minn. Ct. App. 1984) (court holds that the finding of fraud was *implicit* in the jury's verdict).

CONCLUSION

As this Court recently cautioned, "the trial should be the 'main event' . . . rather than a 'tryout on the road.' " *Anderson v. City of Bessemer,* ____ U.S. ____, 105 S.Ct. 1504, 1512 (1985). The court of appeals has recognized as a matter of legal principle that a jury verdict should not be reversed so long as "evidence reasonably or fairly tends to sustain it." *Rochester Civic Theatre v. Ramsay,* 368 F.2d 748, 753 (8th Cir. 1966). In this case not only does substantial evidence exist in the record to support all of the jury's determinations, there is *no* testimony contradicting the jury findings. The jury, after hearing the evidence and following careful instructions, completed a detailed special verdict form. The effect of the court of appeals' decision is to emasculate the jury findings and verdict.

Petitioner respectfully submits that the court of appeals has improperly applied the standard of review to the facts of this case. The court has erroneously reweighed the evidence and thereby substituted its judgment for that of the jury. *Dick v. New York Life Insurance Company,* 359 U.S. 437, 445 (1959). Such review contravenes the rulings of this Honorable Court. See *A & G Stevedores v. Ellerman,* 369 U.S. 355 (1962); *Lavender v. Kurn,* 327 U.S. 645 (1946).

As stated by Justice Black in *Neely v. Martin K. Eby Construction Company,* 386 U.S. 317 (1967), if:

> [t]he court of appeals was wrong in concluding that the evidence was insufficient to go to the jury, then its reversal of the jury's verdict was a violation of the Seventh Amendment, and certainly this is the kind of plain constitutional error that this Court can and should correct.

Id. at 332 (Black, J., dissenting).

The recent case *Anderson v. City of Bessemer, supra,* provided this Court with an opportunity to clarify the "clearly er-

roneous" standard of appellate court review under Rule 52. Moreover, numerous Supreme Court decisions have construed the relationship between the Seventh Amendment, special interrogatories and general verdicts under Rule 49(b).

Few pronouncements by this Court, however, have touched upon the legal guidelines contained in Rule 49(a) of the Federal Rules of Civil Procedure and no decision of this Court has directly interpreted the commands of Rule 49(a). This case presents a unique opportunity for this Court to clarify and construe the mandate of this important rule.

The court of appeal's decision substantially departs from the mandates of the Seventh Amendment to the United States Constitution and Rule 49(a) of the Federal Rules of Civil Procedure. If left to stand, the present decision is inconsistent, contradictory, and contrary to applicable law. For these reasons, petitioner Minnesota Timber Producers Association respectfully requests that its Petition for a Writ of Certiorari be granted.

Daniel H. Mundt
MUNDT & ASSOCIATES
715 West Superior St.
Duluth, MN 55802
Telephone: (218) 722-3665

Attorney for Petitioner

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-5113

Minnesota Timber Producers
Associations, Inc.,
Appellee,

v.

American Mutual Insurance
Company of Boston,
Appellant,

v.

Tom Evenson, James Hall,
Thomas McCabe, Clayton
Peterson, and John Peterson,
Appellees/Intervenors.

Appeal from the United
States District Court for
the District of Minnesota.

Submitted: December 11, 1984

Filed: July 11, 1985

Before HEANEY, ROSS, and FAGG, Circuit Judges.

FAGG, Circuit Judge.

American Mutual Insurance Company of Boston (American Mutual or Company) appeals from an adverse jury verdict rendered in favor of the Minnesota Timber Producers Association, Inc. (MTPA or Association). Three issues are presented by this appeal. First, did American Mutual and the Association enter into a contract establishing the terms and conditions of a group worker compensation insurance program? Second, if such a contract was entered into, did American Mutual breach the terms and conditions of this contract by unilaterally altering the operation of the group program? Third, if American Mutual breached this contract, did the actions constituting the breach also constitute fraud or a breach of fiduciary duty and thus support an award of punitive damages?

Following trial, the jury concluded that American Mutual and the Association had entered into a contract and that this contract controlled the terms and conditions of a group worker compensation insurance program. The jury also concluded that American Mutual breached this contract and that this breach constituted either fraud or a breach of fiduciary duty. On the basis of these findings, the jury awarded the Association $237,836 in compensatory damages and $1,000,000 in punitive damages. We affirm in part and reverse in part.

The MTPA is a nonprofit Minnesota corporation which actively represents many Minnesota timber producers. In the late 1960s and early 1970s, the Association began to explore the possibility of establishing a group worker compensation insurance program for its members. In June of 1972, the Association's insurance committee met with representatives of American Mutual to discuss the possibility of establishing such a program for the members of the MTPA.

These discussions centered around the creation of a worker compensation "safety group." This safety group would be made up of qualifying timber producers who, through a defined program of accident prevention and loss control, would work with American Mutual's engineers and safety experts to reduce

the overall cost of worker compensation insurance. The savings realized by these efforts would be returned to the individual members of the group in the form of a "dividend." The dividend received by any individual participant would represent that participant's pro rata share of the money remaining after losses, charges, and other costs were deducted from the total group premium collected in that particular year.

Following these discussions, American Mutual presented the insurance committee with what it termed a "Proposal for Insurance Coverage." This proposal embodied the parties' previous discussions and detailed specifically both how the safety group would be established and how the group would operate. The proposal also sought the endorsement of the Association and provided that once the Association agreed to endorse American Mutual's plan, American Mutual would solicit directly the members of the MTPA. Timber producers who joined the safety group would receive individual insurance policies from American Mutual, and when a minimum of fifteen members and $50,000 in annual premiums had been enlisted, the insurance plan as outlined in the "Proposal for Insurance Coverage" would go into effect.

The American Mutual proposal also detailed how the yearly dividend would be determined. The proposal provided that the dividend would be established by the American Mutual board of directors through the applicaiton of the Company's "dividend guideline rules." The dividend guideline rules were made a part of the American Mutual proposal.

These rules provided that all premiums paid to the Company by the safety group for any one year would be pooled. From this total pool of premiums, administration charges, insurance charges, and losses would then be deducted. After these deductions were made, a portion of the remaining balance (the gross dividend) could, in the discretion of American Mutual's board of directors, be placed in a contingent balance fund.

The money placed in this fund was to be retained by the Company both to cover unexpected losses and to help stabilize dividend return. The amount that could properly be retained by the Company, however, was specifically limited to the following amounts:

(1) 20% of the first $100,000 in yearly premiums could be placed in the fund;

(2) 15% of the next $400,000 in yearly premiums could be placed in the fund; and

(3) 10% of amounts over $500,000 in yearly premiums could be placed in the fund.

After allowing for any permissible amount that might be placed in the contingent balance fund, the dividend guidelines rules provided that the amount remaining was to be "available" for distribution as a dividend. No other contingent fund was provided or allowed for by the proposal.

After receiving the proposal, the Association and American Mutual discussed various aspects of the proposal and its operation. These discussions focused primarily on the contingent balance fund, to which the Association was initially opposed. The Association, however, eventually agreed to accept the contingency fund as presented in American Mutual's proposal. Apparently, two primary factors persuaded the Association to accept the establishment of this fund. First, the amount of money that could be placed in the fund was subject to specific, well defined limitations. Second, the money placed in the fund would, in the event that the group was terminated, be distributed to the plan's participants.

In December of 1972, the MTPA board of directors agreed to endorse the American Mutual proposal. Following this endorsement, American Mutual began to solicit potential plan participants. Within a few months, the minimum number of participants and premiums had been reached and the plan was placed into effect.

Between 1973 and 1978, the plan grew steadily and proved quite successful. The Association and American Mutual worked closely together and each took an active role in dealing with and correcting any problems that arose. During that period, over $1,000,000 in dividends were returned to the plan's participants which, beginning in 1974, included both MTPA members and non-MTPA members. On the whole, the insurance group was operated and administered as had been presented in the American Mutual proposal.

In November of 1978, the American Mutual board of directors modified the Company's national worker compensation plan. This plan, which was adopted by the Company in 1963, established the Company's guidelines with respect to its many worker compensation safety groups. Although American Mutual's 1972 proposal to the Association was based on this plan, it appears (and the jury could have found) that the Association was not made aware of the existence of this national plan during the formation of the MTPA/American Mutual safety group.

While several modifications to this national plan were made by the American Mutual board of directors, the modification most relevant to this action authorized the board to create a second type of contingency fund, a dividend stabilization fund. This fund, when actually established for a particular safety group, would enable the Company to retain (for a limited time) amounts over and above those authorized to be placed in the contingent balance fund by the dividend guideline rules. While the American Mutual proposal had specifically provided for a contingent balance fund, it did not provide for or anticipate the establishment of any additional contingency fund.

In February of 1979, the Company's board of directors, in determining the MTPA 1978 dividend, applied these modified national rules to the Association's safety group and placed $219,782 in the dividend stabilization fund. In late 1979 or early 1980, the directors, in determining the MTPA 1979 dividend,

placed $165,819 in the dividend stabilization fund. In 1980 and 1981, these amounts were returned to the members of the safety group pursuant to the Company's modified national rules. The Association learned of these actions only after the present lawsuit had begun.

In 1981, for a variety of reasons, MTPA revoked its endorsement of the American Mutual plan. Following this revocation, the Association took the position that the removal of its endorsement terminated the safety group as a whole and requested that American Mutual return the money it then held in the contingent balance fund. American Mutual refused, taking the position that the withdrawal of the Association's endorsement had no effect on the operation of the safety group. This litigation followed.

In its complaint, the Association asserted a variety of claims centering around breach of contract, breach of fiduciary duty, fraud, and breach of warranty. Initially, the controversy focused on the Association's right to terminate the insurance group and by that means obligate American Mutual to return the money retained by it. At trial, however, the central issue became whether any type of contractual agreement existed between the parties and whether American Mutual breached any such agreement through the creation of the dividend stabilization fund. A further issue became whether the creation of this fund not only breached a contractual agreement but whether the same actions constituting the breach also constituted fraud or a breach of fiduciary duty and would support an award of punitive damages for the breach of contract.

Three central issues were submitted to the jury. First, did a contract exist? Second, was that contract breached? Third, did the breach constitute fraud or a breach of a fiduciary duty and as such support an award of punitive damages? A separate fraud count based on asserted misrepresentations of one of American Mutual's employees was not submitted to the jury.

Also, the issue of whether the Association could properly terminate the group was not submitted to the jury. As indicated, the jury answered all three issues submitted to it affirmatively and awarded $237,836 in compensatory damages and $1,000,000 in punitive damages. This appeal followed.

The first issue to be addressed is whether a contract establishing the terms and conditions of a group insurance program was entered into between American Mutual and the Association. Because this case is brought in diversity, we look to the substantive law of Minnesota in making our decision. In Minnesota, the existence and terms of a contract are for the jury. *McEwen v. State Farm Mutual Insurance,* 281 N.W.2d 843, 845-46 (Minn. 1979); *Swanson v. American Hardware Mutual Insurance Co.,* 359 N.W.2d 705, 708 (Minn. App. 1984). We must review the evidence presented at trial in the light most favorable to the prevailing party, and the verdict will not be reversed "if the evidence reasonably or fairly tends to sustain it." *Lesmeister v. Dilly,* 330 N.W.2d 95, 100 (Minn. 1983). *See also DeWitt v. Brown,* 669 F.2d 516, 523 (8th Cir. 1982), and *Hanson v. Ford Motor Co.,* 278 F.2d 586, 589-90 (8th Cir. 1960) (Where the state and federal tests for sufficiency of the evidence are similar and neither party has raised an issue with respect to which test should be applied, the state test is controlling.). Here, after carefully reviewing all the evidence, we conclude that the jury could reasonably have found that a contract establishing the terms of a group worker compensation insurance program had been entered into by American Mutual and the Association.

The American Mutual proposal followed a series of discussions, the specific focus of which was the establishment of a group worker compensation insurance program. The proposal presented by American Mutual outlined in significant detail how the plan was to operate and in particular how dividends were to be established. After the Association agreed to and endorsed the terms of the American Mutual proposal (exactly as presented), the plan was implemented by both parties and, ex-

cept for minor modifications that were agreed to by both parties, operated precisely as intended for five years. During this period, both the Association and American Mutual were actively involved in the plan and worked closely together in making the plan a success. Given this evidence, we cannot say that a jury, considering not only the documentary and testimonial evidence but also considering all the surrounding facts and circumstances in the context of the entire transaction, *see Capital Warehouse Co. v. McGill-Warner-Farnham Co.*, 149 N.W.2d 31, 35 (Minn. 1967), could not reasonably conclude that in return for the Association's endorsement and active participation American Mutual agreed to abide by the terms and conditions set out in its proposal.

Once we conclude that a contract existed between the parties, we must next determine whether this contract was breached by American Mutual. The Association asserts that American Mutual breached the contract when it unilaterally applied the modified national rules to the Association's safety group and established a second contingent fund, the dividend stabilization fund. The jury accepted the Association's position, and we cannot say that its conclusion is without substantial support.

The American Mutual proposal allowed for the creation of a single fund, the contingent balance fund. The proposal also specifically limited the amount of money that could be placed in this fund. Under the proposal, all other money remaining was to be "available" for dividends. In light of the parties' extensive negotiations on this point and in light of the Association's express concern over the amount of money to be retained, the jury could reasonably find that under the terms of the parties' agreement all money not placed in the contingent balance fund was to be returned as dividends. Therefore, when American Mutual unilaterally created a second fund and retained money that otherwise would have been returned, it breached its agreement with the Association and became liable for damages caused by this breach.

As compensatory damages for this breach, the jury awarded the Association $237,836. Although indirectly, American Mutual attacks the amount and composition of this award. While the jury did not specify the basis for this amount, it appears (and the parties agree) that the award is made up of two basic components: (1) interest on the money wrongly retained by American Mutual in the dividend stabilization fund; and (2) money held by American Mutual in the contingent balance fund at the time the Association filed its amended complaint. We conclude that only the first of these two awards was appropriate.

In its instructions, the district court told the jury that between six and twelve percent interest could be awarded on the money improperly retained (although subsequently returned) by American Mutual. Assuming that the jury awarded the Association twelve percent simple interest on the money improperly retained ($219,782 was improperly retained from 1978 to 1980 and $165,819 was improperly retained from 1979 to 1980), only $92,544 should have been awarded. This amount properly compensates the Association for the loss, and the jury's award is affirmed to this extent.

With respect to the money awarded by the jury from American Mutual's contingent balance fund ($145,292), we reverse. The money held by the Company in its contingent balance fund could only have been awarded to the Association if the jury found that the withdrawal of the Association's endorsement effectively terminated the safety group. This issue, however, was not submitted to the jury. Hence, the money held by the Company at the time the Association filed its amended complaint cannot provide a basis for recovery.

However, even if this issue had been submitted to the jury, we do not believe the jury could reasonably have found that the Association's withdrawal terminated the safety group. While the possibility that the group might at some time be terminated was anticipated, specifics such as how the group would be ter-

minated, who could terminate the group, and under what circumstances the group could be terminated, were not discussed by the parties and were not made a part of either the American Mutual proposal or the parties' agreement. Accordingly, the Association had no contractual right or authority to terminate the group. Rather than result in the group's termination, we conclude that the Association's withdrawal of its endorsement simply ended its contractual relationship with American Mutual and absolved both parties of further performance under the terms of the agreement. As a result, while we affirm the jury's award of compensatory damages to the extent necessary to compensate the Association for the lost use of the money improperly retained by American Mutual ($92,544), we reverse the jury's award to the extent it included money held by the Company at the time that MTPA filed its amended complaint ($145,292).

In reaching this result, however, we express no opinion on the issue of termination itself. Both parties agree that the contingent balance fund belongs to the participants of the plan and that upon termination of the insurance group those participating in the group will be entitled to a full accounting and to the return of the funds held by the Company. Our decision in this action has no effect on and in no way lessens this underlying obligation on the part of the Company.

We turn next to the jury's award of punitive damages. Under Minnesota law, a plaintiff may recover punitive damages "only upon clear and convincing evidence that the acts of the defendant show a willful indifference to the rights or safety of others." MINN. STAT. ANN. § 549.20 More specifically, in a contract action punitive damages are not available "except in exceptional cases where the breach is accompanied by an independent tort." *Barr/Nelson, Inc. v. Tonto's, Inc.*, 336 N.W.2d 46, 52 (Minn. 1983); *Space Center, Inc. v. 451 Corp.*, 298 N.W.2d 443, 452 (Minn. 1980). In fact, only in cases in which "the breach has resulted from an independent or willful tort and the defendant acted with malice" will punitive damages be recoverable in a contract action. *Cherne Industries, Inc. v.*

Grounds & Associates, 278 N.W.2d 81, 95 (Minn. 1979); *see also Wild v. Rarig,* 234 N.W.2d 775, 789-90 (Minn. 1975), *cert. denied,* 424 U.S. 902 (1976). Malicious and willful breach is not enough to give rise to punitive damages in a contract action and goes only to the issue of whether a material breach has occurred. It is only if the willful and malicious conduct itself constitutes an independent tort as well as a breach of contract that punitive damages will be available. *Barr/Nelson,* 336 N.W.2d at 52-53.

In the present action the Association has asserted two grounds in support of the jury's award of punitive damages. First, it asserts that the Company's conduct breached a fiduciary duty owed to the Association. In the alternative, the Association argues that this conduct constituted fraud. We reject both of these assertions.

We address first the issue of whether or not a fiduciary relationship existed between American Mutual and the Association. We emphasize that we are dealing only with the relationship existing between American Mutual and the Association. We are not concerned with whether any type of fiduciary relationship might exist between American Mutual and the members of the safety group who actually purchased the worker compensation insurance. This issue was never litigated, and it is clear from the record that the question of a fiduciary relationship submitted to the jury involved only the relationship between American Mutual and the Association.

Under Minnesota law, "[a] fiduciary relationship exists 'when confidence is reposed on one side and there is resulting superiority and influence on the other; and the relation and duties involved in it need not be legal, but may be moral, social, domestic, or merely personal.' " *Toombs v. Daniels,* 361 N.W.2d 801, 809 (Minn. 1985) (quoting *Stark v. Equitable Life Assurance Society,* 285 N.W. 466, 470 (Minn. 1939)). Other factors, such as disparity in business experience and greater access to facts and legal resources, may also, when combined with a confidential relationship, give rise to a fiduciary relationship.

Id. Reviewing the evidence presented in light of these factors, although the existence of a fiduciary relationship is a question of fact and normally for the jury, *see Murphy v. Country House, Inc.*, 240 N.W.2d 507, 512 (Minn. 1976), we conclude as a matter of law that no such relationship existed between the Association and American Mutual.

In its essence, this is a contract action. The parties dealt with each other on an arm's length basis and there is no evidence that any type of fiduciary relationship was intended or in fact that any type of confidential relationship existed between American Mutual and the Association. Further, the Association made no showing that American Mutual enjoyed superior or excessive influence over the Association. Rather, the only evidence pointed to by the Association is a statement by an officer of the Association that they "trusted" American Mutual. We conclude as a matter of law that no fiduciary relationship existed between the parties.

We next address the issue of fraud. In so doing, we are not concerned with whether separate and apart from the acts constituting the breach certain actions of American Mutual were themselves fraudulent. Rather, because the only cause of action submitted to the jury was based on breach of contract, we are concerned only with whether the same actions constituting the breach also constitute the independent tort of fraud. *Barr/Nelson*, 336 N.W.2d at 52; *Cherne*, 278 N.W.2d at 95; *Rarig*, 234 N.W.2d at 789-90. Given this focus, we conclude that the breach of contract did not constitute fraud.

The actions taken by the Company were taken in the belief that they had the right to apply the modified national rules to the Association's safety group. By so doing, the Company breached its contract with the Association. The acts constituting the breach, however, did not violate any independent duty (fiduciary or otherwise) owed by American Mutual to the Association and did not constitute fraud or any other independent tort. Consequently, while separate and apart from the breach, certain actions of the Company might have given rise to

separate tort liability and potentially to punitive damages, the actions constituting the breach do not. Thus, the jury's award of punitive damages for breach of contract was improper and must be reversed.

We affirm the jury's conclusion that a contract existed and that this contract was breached. We also affirm the jury's award of compensatory damages to the extent necessary to compensate the Association for the lost use of the money improperly retained ($92,544). However, we reverse the remainder of the jury's compensatory damages award and the jury's award of punitive damages.

Affirmed in part and reversed in part.

ROSS, Circuit Judge, dissenting.

I dissent because I do not believe that, as a matter of law, there was ever a contract between Minnesota Timber Producers Association and American Mutual Insurance Company.

In the magistrate's opinion he carefully sets forth the reasons for his finding that there was no contract which the Association had standing to enforce. I agree with these reasons and note that the facts clearly show as follows:

1. There was no formal written contract between the Association and American Mutual.

2. The Association was not a party to the written insurance policy contracts between the members and nonmembers of the Association and American Mutual. It did not claim to be a party to a contract with American Mutual for several years after the policies were issued.

3. Dividends in excess of $3.4 million were paid direct to the individual policyholders rather than to the Association.

4. Cancellation rights were provided in the individual policies of each member and nonmember of the Association.

5. The plan eventually included both members and nonmembers of the Association. It is not clear to me how the Association intends to distribute the money or under what theory they are being permitted to collect on behalf of the nonmembers of the Association.

In my opinion, the documents and the testimony received in this case do not show the existence of any contract between the Association and American Mutual. I agree with the balance of the reasoning of the majority opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JUDGMENT

No. 84-5113MN

September Term, 1984

Minnesota Timber Producers Assn, Inc.
Appellee

vs.

American Mutual Insurance Co.,
Appellant,

vs.

Tom Evenson, et al,
Appellee/Intervenor.

Appeal from the United States
District Court for the
District of Minnesota

This appeal from the United States District Court was submitted on the record of the said district court, briefs of the parties and was argued by counsel.

Upon consideration of the premises it is hereby adjudged and decreed that the judgment of the district court is affirmed in part and reversed in part in accordance with the opinion of this Court.

July 11, 1985

A true copy.

ATTEST:

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-5113-MN

Minnesota Timber Producers
Associations, Inc.,
Appellee,

vs.

American Mutual Insurance
Company of Boston,
Appellant.

Appeal from the United States
District Court for the
District of Minnesota

Appellee's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

August 20, 1985

APPENDIX D

Trial Exhibit (Summary of MTPA-AM Plan)

IV. DIVIDEND GUIDELINE RULES

A.

THE PLAN

Basic Premium

24

&

B.

LOSSES

1. Incurred during year (Valued six months after expiration)
2. Plus or minus changes in preceeding year's reserves.

C.

&

INSURANCE CHARGE

1. To protect the company against catastrophe losses since the plan provides for no surcharge.
2. Decreases as the contingent balance in escrow increases.

IF CONTINGENT BALANCE IS:	INSURANCE CHARGE IS:
0%	7%
5%	5%
10%	3½%
15%	2½%
20% and over	2%

D. Balance available for Contingent Balance and Dividends.

E. Allocated to Contingent Balance.

1. Stabilizing fund - to establish dividend returns.

2. Dollars belong to Association, not to Insurance Co.

3. 25% of "D" until balance equals 20% of annual premium - at $ 100,000 or 17.5% at $ 200,000 as follows:

First	$ 100,000	20%
Next	$ 400,000	15%
Over	$ 500,000	10%

F. Remainder available for dividend distribution.